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October 10, 2005

Legislative Services Agency

RE: American Bar Association's Model Procurement Code

Attn: Mr. Sam Leto and/or Mr. Doug Wulf;

As you know, Iowa Code Chapter 8D provides the Iowa Communications Network (ICN) with independent procurement authority. Pursuant to the request of the Government Oversight Committee, the ICN has reviewed the American Bar Association's Model Procurement Code (MPC). After a careful review, the ICN opposes the adoption of the MPC.

The MPC does contain some valid and useful practices and procedures such as, but not limited to Sections 10-202, 10-203 and 10-204, which foster increased cooperation between Public Procurement Units. However, adaptation of the MPC would potentially hinder the ability of an agency to effectively and expeditiously source, solicit, evaluate and complete a purchase by making the process more cumbersome.

The MPC references a procurement policy office, a chief procurement officer, a procurement advisory council, a procurement institute and a procurement appeals board. Adding additional positions, entities, and cost would seem inconsistent with the State's other ongoing efforts to streamline and reduce costs (such as the strategic procurement initiative).

Section 2-102 provides all purchasing power with the procurement policy office. Section 2-204 provides that the chief procurement officer does all of the State's procurement, inventory management, compliance, and monitoring. Since all purchasing power would be in one entity, this would either require the legislature to revoke the independent purchasing authority of other agencies, such as the ICN, or to add another layer of bureaucracy over those agencies that already have independent purchasing authority.

Section 2-303 contains very limited exemptions from procurement pursuant to MPC procedures. Under the MPC, the authority to conduct exempted procurements is delegated by the Legislature to the Purchasing Agencies. If such legislative delegation is not received or ordered by regulation and or obtained with the Governor's approval, all purchases must be procured thru the Office of the Chief Procurement Officer. One notable absence that would seem to be applicable to all agencies would be expert witnesses. Any agency can get sued, and may have the need to retain an expert in defense of the litigation. It's simply impractical to obtain those through a competitive bidding process. Current Iowa law recognizes this. The MPC doesn't appear to do the same.

Section 9-402, the Appeals section, gives an aggrieved party 14 days to file a protest from the date it knew or should have known of facts giving rise to the protest. This is longer than the current 5 days permitted by ICN rules. There would be an automatic stay of the contract award unless the chief procurement officer issues a written decision that continuation of the process was necessary to protect the substantial interests of the State. Present rules don't require a stay. While the ICN would rarely enter into an agreement while a vendor appeal is pending, the ICN could start negotiations with the winning vendor during an appeal to avoid a long delay. The MPC would generally prohibit that. Further, a prevailing appellant would be entitled to costs. Also, if the State has to revoke a contract with a winning vendor due to a successful appeal, the vendor who was formerly awarded the contract could also potentially recover statutory damages. All of these would seem to provide an incentive to appeal, which would increase the cost and decrease the speed of state procurement.

In many key areas, the MPC isn't very specific—or at least not nearly as specific as present Iowa law. Regulations regarding sole-sourcing, for example, are already in Iowa law. The MPC doesn't have them, and new regulations based upon the MPC would need to be drafted.

The only potentially positive justification for the MPC is an argument for uniformity. Proponents argue that since other states have adopted the MPC, vendors may have lower costs when bidding in an MPC state because they would not have to tailor their proposals or bids for each state. However, the MPC enters so many alternatives and requires so many administrative rule interpretations that it's questionable whether the purchasing laws of any two MPC states are substantially similar.

The ICN would like to be considered for membership in the blue ribbon panel to be assembled for development of procurement recommendations. Considering the ICN operates and maintains the State's fiber optic network, a unique system in the public sector and our independent purchasing authority, we feel that we would offer a different perspective to the panel.

This position paper is offered on behalf of the ICN in response to the Government Oversight Committee's inquiry regarding the potential adoption of the MPC in the State of Iowa. Please contact me if you have any questions or comments or would like to discuss further. Thank you for requesting, and considering, the input of the Iowa Communications Network.

Sincerely,

John P. Gillispie  
ICN Executive Director